NO. 22503

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EDGAR P. GAUTREAUX, etc., et al.,

Appellants,

vs.

KATHERINE KUMM and
MARY J. SWEENEY,

Appellees.

APPELLANTS' OPENING BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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FILED
MAR 21 1968
WM. B. LUCK, CLERK

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JURISDICTIONAL STATEMENT

This is an appeal from a final judgment of the District Court, Central Division of California, in an action in interpleader, entered September 12, 1967, ordering distribution of certain funds deposited into the court by the plaintiff in interpleader. Notice of appeal was filed September 21, 1967.

The District Court had jurisdiction under the Interpleader Act, 28 U.S.C. §1335(a); see also Federal Rules of Civil Procedure, Rule 22. This Court has jurisdiction of appeal from final judgment, under 28 U.S.C. §1291.

QUESTIONS PRESENTED

1. Whether a court, exercising equitable jurisdiction of an interpleader action, may, consistently with the due process clause and established precedent, impose its subjective, arbitrary determination of what constitutes a "fair settlement" of conflicting claims of the litigants, without conducting trial or receiving evidence.

2. Whether a District Court is required to give full faith and credit to an in personam judgment of a state court having jurisdiction, by which one group of interpleader claimants is awarded money judgment against the opposing group, or if the court may refuse to give effect to that judgment because the defendant group defaulted in the state court, and instead allow those judgment debtors to share in the fund equally with (or in preference to) their own judgment creditors.

3. Where, of two groups of claimants to a fund in interpleader, one group is comprised of the victims of a tort and the other group is comprised of those who are vicariously liable for the tort, do the equitable principles controlling interpleader allow the latter group to assert their own tortious conduct as a basis for sharing the fund with the victims?

STATEMENT OF THE CASE

This is an action in interpleader.

The case was commenced by Travelers Indemnity Company, an insurance company, acting as stakeholder in connection with a certain automobile insurance policy it has issued to one of the appellees, Mary J. Sweeney. That policy had a limit of $10,000 for each person and $20,000 total. Travelers paid the full amount of the policy into the registry of the District Court and prayed for an interpleader of all claimants under the policy and the consequent discharge of Travelers [C. T. 2-5]. [1/]

Numerous claimants or potential claimants, including the present appellees and appellants, answered and cross complained, seeking adjudication of their claims to that fund [C. T. 6-41].

Thereafter, Travelers (the plaintiff) moved for and was granted summary judgment, absolving it of further liability and discharging it from the case, which order has become final [C. T. 42-46, 53-54 and 56-59]. All of the remaining defendants in interpleader, except the present appellants and appellees, have eventually been discharged from the case, upon disclaimer or stipulation, the

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[1/] Matters of Form: Volume 1 of the record, a transcript of the Clerk's papers as filed and docketed January 19, 1968, will be cited, in brackets, as "C. T." (for Clerk's Transcript), followed by the page and, where appropriate, a colon and line numbers. The separate reporter's transcripts of proceedings which took place February 8 and August 28, 1967, will be cited within brackets as "R. T.", followed by the date of the proceeding to which reference is made, the page, a colon and line numbers.

orders discharging them having become final without remaining materiality to this appeal [C. T. 82-83, 89-92 and 94-96].

Two separate open-court proceedings were held. On February 8, 1967, a number of the parties, including some of those subsequently discharged (as described above), appeared before the District Court, basically to determine the propriety of maintaining the action and the procedure for releasing a number of the minor claimants or potential claimants and also of withdrawing the fund on deposit and placing it in a trust account pending final judgment; all of this was worked out to the satisfaction of all concerned [R. T. 2/8/67, page 3, et seq.]. No evidence was taken.

Following the discharge of the remaining parties, the present litigants again appeared before the District Court on August 28, 1967. No evidence was taken at that hearing either, although the court did refer to a "xerox copy of the judgment of $25,000 in the California State courts" [R. T. 8/28/67, 13-16 and 21-23]. The court also observed that it had "worked on this thing Sunday" [R. T. 8/28/67, 5:24-25]. The remainder of the hearing was devoted to an extended colloquy about arithmetic computation of various items the court was considering, primarily conducted between the court and counsel for appellees [pages 5-27]. At the conclusion, the court observed:

> "[I]f the parties can stipulate to it, so much the better. The judgment to be entered in that amount. If you don't, I will still enter it. I think, it is a fair settlement. Is there any objection?" [27:13-17].

While appellees appeared perfectly satisfied, these appellants were not. The court, however, stated:

> "I am going to make the order, you [appellees' counsel] draw the order. I want to get rid of this case. I can't keep these forever.
>
> "In view of the special damages, which were miniscule certain value not in existence by the plaintiff (sic), I think it is a fair settlement. And, you can tell your counsel in New Mexico I feel it is." [R. T. 8/28/67, 28:13-19, emphasis added].

Judgment was thereafter entered, the court making extensive findings of fact and conclusions of law [C. T. 111-115]. In essence, the fund was divided:

> To appellees, owner of the insured vehicle and joint venturers with the negligent driver: $11, 058. 89;
>
> To appellants, orphans and widower of the innocent deceased and victims of the negligence themselves: $8233. 70 [C. T. 114:15-25].

There being no evidence, either oral or documentary, introduced, there are no facts to be summarized for this Court. However, certain putatively factual matters have managed to find their way into the record, generally in the form of contentions of the parties or anomalous documents simply reposing in the file without further explanation. A few of these will be canvassed here.

Contentions will be recited only when they are the contentions of the appellees; although such a contention is, of course, still not evidence, it is safe to assert that the Court will hold appellees to their own contentions, so that they may be treated as factually established in appellants' behalf although not necessarily in appellees' own, self-serving behalf.

The controversy arose out of an automobile accident which occurred at 5 p.m. on July 15, 1964 on U. S. 66 near Gallup, New Mexico. One of the vehicles involved was appellees' automobile, a two-door Falcon driven by one Ann Margaret Baumbach, now deceased, and owned by the appellee Katherine Kumm, who was also a passenger in that car [C. T. 71:17-23]. Appellee Kumm, the driver and the others then riding in that car had previously entered into a joint venture, pursuant to which their driver was operating their car [C. T. 9:11-27].

As a direct and proximate result of the negligence of appellees' driver-joint venturer, appellees' automobile went out of control, skidded into the opposite traffic lane, glanced off an automobile driven by one of the since-discharged parties, turned over on its side and collided with a car driven by one of the appellants, in which the other appellants and their deceased wife and mother were riding [C. T. 10:2-18; 12:12-29; 72:30-32 and 71:26 - 72:2]. 2/ In that collision, appellees' driver-joint venturer

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2/ For such additional import as it may have, the factual statements here recited, together with those in the previous record reference, were verified on the oath of one of the appellees [C. T. 14].

and one Elva Baumbach, a passenger and member of the joint venture were killed, as was Agnes Gautreaux, a guest passenger in appellants' vehicle who was respectively the wife and mother of the remaining appellants [C. T. 72:2-5]. The owner-joint venturer Katherine Kumm claimed to have sustained personal injuries [C. T. 72:5-9].

Appellee Katherine Kumm sued the estate of Ann Margaret Baumbach, the deceased driver-joint venturer, in the California state courts, on the ground that the deceased's negligence proximately caused injury and death to her passengers-joint venturers, in which suit the appellee Sweeney joined for damages for wrongful death (similarly caused) to her mother. The California Superior Court rendered judgment for both appellee Kumm and appellee Sweeney, and against the Baumbach estate, in the ostensible amount of $25,000 for Kumm separately and $10,000 for Kumm and Sweeney jointly. In actuality, however, that judgment was not a monetary, in personam judgment, since it went on to provide: "that execution of this judgment shall be limited to the funds now on deposit in the United States District Court, Central District of California, in an action entitled [giving the title of the present case]." Thus, it was in legal effect only an in rem order of the California Superior Court affecting the funds over which the District Court was exercising jurisdiction [C. T. 105-106].

Appellants brought suit for personal injury and wrongful death against the appellee Kumm and the administratrix of the estate of appellees' deceased driver, in the District Court of the

State of New Mexico for the district in which the accident occurred. Judgment was rendered against both defendants (appellees here) in the respective amounts: Appellant Edgar P. Gautreaux, as administrator, $100,000; appellant Edgar Gautreaux, individually, $5,000; appellants Shirley and Eloise Gautreaux, $10,000 each, for a total of $125,000.

That New Mexico judgment, unlike the California one, was a plenary, in personam judgment, in no way tied to the present case [C. T. 97-100].

SPECIFICATION OF ERRORS

1. It was manifest error for the District Court to impose its own subjective predetermination of what constituted a "fair settlement" of conflicting claims to the fund deposited into court, without conducting any trial or receiving any evidence, in contravention of due process requirements and established precedent.

2. It was manifest error for the District Court to refuse to give full faith and credit to a New Mexico judgment in favor of appellants and against appellees and to collaterally abrogate that judgment merely because appellees had failed to appear in the New Mexico action. This was aggravated by the District Court's apparent preference for a California judgment which did favor appellees, but to which appellants were not parties and which was not an in personam, plenary judgment, but rather an attempt by the state court to impose an in rem order on the fund deposited into the

District Court.

3. Even if recognized procedure had been followed and there had been a prior adjudication, it was violative of established principles of law and equity to allow appellees to set up their own tortious conduct as a basis for sharing in the fund, particularly where they were thereby allowed to profit by their own tort as against the victims of that tort.

ARGUMENT

I

ADVERSE CLAIMS OF LITIGANTS MAY CONSTITUTIONALLY AND PROPERLY BE DECIDED ONLY UPON EVIDENCE AND TRIAL, EVEN WHERE THEY ARE PRESENTED IN AN ACTION IN INTERPLEADER.

A. THERE IS NO CONFLICT IN THE RECORD AS TO THE FACT THAT NO TRIAL WAS CONDUCTED OR EVIDENCE TAKEN, THE DISTRICT COURT APPARENTLY BELIEVING THAT NONE WAS NECESSARY.

The District Court's method of "adjudicating" the conflicting claims of the litigants appears to be as unexplained as it is unprecedented and unjustified. The preamble to the findings of fact recites the receipt of evidence by the court and employs the bromidic language "the Court having duly considered the evidence . . ." [C. T. 112:7-16], but the simple fact remains: There was no evidence and no trial within any conceivable meaning of those terms known to Anglo-American jurisprudence. The "detailed computation

in open court in the presence of counsel" described in the conclusions [C. T. 114:15-16] similarly adds little. The most infinitely detailed "computation" is a legal nullity if its components are non-evidentiary.

The record actually reveals that the court simply calculated out a batch of figures and informed appellants that they had a Hobson's choice between stipulating to accept those figures or having the court make a judgment on them [R. T. 8/28/67, 27-28]. However much -- and however understandably -- the trial court may have wanted "to get rid of this case", and however much the court may have sincerely believed that it was imposing "a fair settlement" by ultimatum, it misconceived its function. Litigation, it is submitted, is a process by which fair adjudications are reached, upon evidence and under the law. It is not a means of imposing settlements based on amorphous concepts of "fairness" upon contesting litigants, without so much as a doff of the hat to the fundamentals of due process.

Indeed, it would be working an unfairness to a skilled lawyer and judge to infer that the District Court even thought it was conducting a trial or hearing evidence. Instead, it seems clear from the record that the court was under the impression -- probably because the unfamiliar realm of interpleader was involved -- that conflicting claims were before the court to be "settled" rather than

adjudicated.[3] That is an understandable error, but it is still an error.

The Supreme Court has held -- during its most recent term -- that a proceeding in interpleader is controlled by the principles of equity and cannot be employed to "strip truly interested parties of substantial rights."

State Farm Fire & Casualty Co. v. Tashire (1967),
386 U.S. 523, 536, 18 L.Ed.2d 270,
87 S. Ct. 1199, 1206.

As it has been similarly stated:

> "Interpleader does not affect the rights of the claimants or the merits of their respective claims inter se. Moore's Federal Practice, 2d ed., vol. 3, par. 22.07, pp. 3021-3022."

Atlantic Refining Co. v. Continental Casualty Co.
(D.C., W.D., Pa. 1960),
183 F. Supp. 478, 486 [6].

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[3] It should be noted that the appellees played a not-inconsiderable role in misleading the court. The purported nature of the proceeding upon which the court acted was a "Notice of Motion for Disposition of Funds on Deposit" [C.T. 101, Dr., R.T. 8/28/67, 3:20]. This is a strange and wondrous procedural animal, for which appellants have found neither authority nor precedent. It was an attempt to short-cut trial by a proceeding infinitely more summary than mere summary judgment.

B. THERE IS ABUNDANT AUTHORITY FOR THE PROPOSITION THAT THE RIGHTS OF CONFLICTING LITIGANTS CAN ONLY BE RESOLVED BY TRIAL, AND UPON EVIDENCE -- EVEN IN INTERPLEADER.

1. WHILE APPELLATE DECISIONS ON THE POINT ARE NOT ABUNDANT, INFERENTIAL AUTHORITY SUPPORTS APPELLANTS' POSITION.

There is something of a scarcity of federal appellate authority specifically holding that conflicting claims must be decided -- even in interpleader -- upon evidence and by trial, and not by ex gratia baby-slicing. It would appear that the lack of such authority has its origin in the uncommon perplexity of the legal researcher: All too often the most self-evident propositions are not litigated (and especially to the higher courts), because of the very fact of that self-evidence. However, there are certain indications in the cases.

The Second Circuit hinted broadly that the normal fact-finding processes are appropriate to an interpleader action, when it held that a particular legal theory urged by an appellant presented a meritorious issue which would have to be determined on remand, "but one which cannot be decided upon the meager record in that respect now before us. The record on this point merely contains assertions and counter assertions of the parties. The relevant facts should be found and given effect after adequate hearing on the remand."

Republic of China v. American Express Co.

(2nd Cir. 1952), 195 F. 2d 230, 235.

That is an exact characterization of the record in the case at bar. Other appellate courts have not apparently been presented with the exact question of whether trial and evidence are necessary (at least so far as appellants can discover), but do seem to presuppose the necessity. For example, this Court dismissed an appeal in an interpleader action, on the ground that appeal was premature since trial had not yet been held, observing:

> "No phase of this question had been tried on the merits. . . ."
>
> Guerin v. Guerin (9th Cir. 1956), 239 F. 2d 909, 913.

If judgment is not final because the trial has "not yet" been held, it seems to follow clearly that there must be a trial.

2. AT THE DISTRICT COURT LEVEL THERE IS A PLETHORA OF REPORTED DECISIONS IRRECONCILABLE WITH THE CONCEPT THAT INTERPLEADER ACTIONS ARE NON-EVIDENTIARY, NON-TRIAL PROCEEDINGS.

Numerous cases have observed that interpleader is a two-stage matter; first, there is a preliminary determination (with plenary trial if necessary) of whether or not interpleader is appropriate and then, if that question is answered in the affirmative, there is a second, at-least-equally-plenary trial on the merits of

the claims. Typically, it is said that the claimants are left to "try" their claims before a trier of fact as in any other litigation.

Eg., Savannah Bank & Trust Company of Savannah v. Block (D. C. S. D. Ga. 1959),
175 F. Supp. 798, 801;
Girard Trust Co. v. Vance (D. C. E. D. Pa. 1946),
5 F. R. D. 109, 114 [9].

Once that second stage is reached -- as it was in this case -- the claimants who remain after discharge of the interpleading plaintiff each become plaintiffs as against the other; they "occupy the position of a plaintiff" and must prove their cases.

Reconstruction Finance Corporation v. Aquadro
(D. C. W. D. Pa. 1947),
7 F. R. D. 406, 409 [3].

The determination of those claims "must await determination at the trial of the issues as to the rights and priorities of the respective claimants."

Poland v. Atlantis Credit Corporation
(D. C. S. D. N. Y. 1960),
179 F. Supp. 863, 868.

Literally innumerable cases could be cited in which the courts have made reference to such familiar characteristics of trial as "offer of evidence", testimony of "competent witnesses" and the like, but the point seems clear. Almost without recognizing any need for discussion, the courts have uniformly treated trial of factual and legal issues in interpleader cases as being entitled to

the same dignity as trial of such issues in any other general framework.

C. WHATEVER THE STATE OF PRECEDENT, THE CONSTITUTION PROHIBITS EXPROPRIATION OF PROPERTY WITHOUT TRIAL OR EVIDENCE -- EVEN IN INTERPLEADER.

Even without the guidance of those earlier decisions, hypothesizing the question as though it were one of first impression, there is another obstacle to prohibit a judge's summary imposition of that which he subjectively and arbitrarily regards as "a fair settlement" upon interpleader claimants. That obstacle is the due process clause of the Constitution.

Procedural due process is not some mere nicety or matter of grace.

> " 'The history of American freedom is, in no small measure, the history of procedure.' "
>
> In Re Gault, 387 U. S. 1, 20-21, 18 L. Ed. 2d 527, 87 S. Ct. 1428. [4]

> "Due process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which

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[4] Quoting the concurring opinion of Mr. Justice Frankfurter in Malinski v. People of State of New York (1945), 324 U. S. 401, 414, 89 L. Ed. 1029, 65 S. Ct. 781.

> defines the rights of the individual and delimits the powers which the state may exercise."
>
> Ibid.

> ". . . [T]he procedural rules which have been fashioned from the generality of due process are our best instruments for the distillation and evaluation of essential facts from the conflicting welter of data that life and our adversary methods present. It is these instruments of due process which enhance the possibility that truth will emerge from the confrontation of opposing versions and conflicting data. 'Procedure is to law what "scientific method" is to science.' "
>
> Ibid.

There is no suggestion in the Fifth Amendment to the effect that a person may be deprived of property without due process of law -- just as long as the deprivation takes place in an action in interpleader. Therefore, it may safely be asserted that appellants were entitled to due process of law before their proprietary claims to the fund involved were "settled".

As a minimum, due process guarantees to any person the right to a day in court which includes "as a minimum, a right to examine witnesses against him, to offer testimony, and to be represented by counsel."

In Re Oliver (1948), 333 U.S. 257, 273,

92 L.Ed. 682, 68 S. Ct. 499.

"[D]ue process requires as a minimum . . . a public trial after reasonable notice . . . a right to examine witnesses against him, call witnesses on his own behalf, and be represented by counsel."

In Re Murchison (1955), 349 U.S. 133, 134,

99 L.Ed. 942, 75 S. Ct. 623.

The lack of "fair hearing" and the introduction of some evidence constitutes a failure to accord "even the minimal standards of due process."

Turner v. Louisiana (1965), 379 U.S. 466, 471-2,

13 L.Ed.2d 424, 85 S. Ct. 546;

Thompson v. City of Louisville (1960),

362 U.S. 199, 206, 4 L.Ed.2d 654,

80 S. Ct. 624.

The question is not "the sufficiency of the evidence" but, as presented in the case at bar, "whether this [judgment] rests upon any evidence at all."

Thompson v. City of Louisville, supra,

362 U.S. at 199;

Cf., Shuttlesworth v. City of Birmingham (1965),

382 U.S. 87, 95, 15 L.Ed.2d 176,

86 S. Ct. 211.

Therefore, the action of the District Court, in dispensing with the rights to call and examine witnesses, to offer testimony and to have judgment rest only upon evidence -- and instead presenting appellants with an arbitrary figure and the ultimatum to stipulate or else -- cannot be tolerated under our constitutional social compact. Beyond doubt, the District Court did realize the import of its acts, nor did it intend to act unconstitutionally. But the Constitution prohibits mistaken and well-intended deprivations of due process, and appellant courts will not engage in over-nice calculations as to how much unconstitutionality occurred or what frame of mind prevailed. A victim of an inadvertent, unintended violation of the Constitution is still entitled to relief.

II

TO THE EXTENT THAT THE COURT BELOW UTILIZED THE ONLY POTENTIAL EVIDENCE, THE STATE-COURT JUDGMENTS, IT FAILED TO GIVE THEM THE EFFECT TO WHICH THEY WERE LEGALLY ENTITLED.

Admittedly, there were two documents which found their way into the record, copies of the New Mexico and California judgments, which might have served as evidentiary support for the judgment. Even putting aside the not-inconsiderable fact that neither judgment was offered or received in evidence (but just somehow lodged), two things are manifest: 1) that the court did not give any effect whatsoever to those judgments, and 2) that when the legally-required effect <u>is</u> given to those judgments it will be entirely

[illegible]

[illegible]

[illegible]

contrary to the result reached below.

A. IT IS SELF-EVIDENT THAT THE COURT DID NOT GIVE EFFECT TO THE JUDGMENTS.

1. IN DIVIDING THE FUND, THE COURT FIXED A RATIO OF 11 TO 8 IN FAVOR OF APPELLEES, WHILE THE JUDGMENTS FAVORED APPELLANTS BY THE PROPORTION OF 4 TO 1.

In the first place, the District Court could hardly have been giving effect to those judgments when it computed its proportions in carving up the fund. The New Mexico judgment, in favor of appellants, was for an amount approximately four times the amount of the California judgment in favor of appellees. Thus, if there were to be any pro rata disposition of the funds, based on the judgments, it would patently be at a rate of 4-1 in favor of appellants over appellees. The distribution, however, was in fact at a ratio of 11-8 in favor of appellees! Manifestly, then, the District Court gave absolutely no consideration to those judgments in establishing the distribution.

2. THE EFFECT OF THE JUDGMENTS WAS THAT APPELLANTS WERE ENTITLED TO RECOVERY AGAINST APPELLEES, WHEREAS THE COURT HELD APPELLEES WERE ENTITLED TO SHARE APPELLANTS' CLAIM TO THE FUND.

The second aspect of the court's failure to give effect to the judgments is even more clear -- and even more incomprehensible. Under the New Mexico judgment, appellants were entitled to recover against appellees (appellee Kumm personally and appellee Sweeney in a representative capacity). Under the California judgment, appellees were not entitled to <u>any</u> recovery against appellants, but only to recovery against third parties, if anyone. [5]

Despite this, the District Court allowed appellees to share in the partial fund which was available to satisfy appellants' claims against those self-same appellees. In short, the judgment debtor was allowed to share part of the judgment creditor's claim. And not only to share, but to share better than 50-50!

In view of that posture of the case, it would test the credulity of this Court to suggest that the District Court was really giving any effect to those two judgments. In fact, the whole thing has something of an Alice in Wonderland aspect to it. It seems clear, thus, that the judgments played no evidentiary role in the decision

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[5] Actually, the California judgment did not entitle appellees to recovery against anybody, but only sought to make a state court adjudication of how the United States District Court should divide a fund; the California Superior Court only awarded appellees a judgment <u>in rem</u>. (Please see sub-section B, <u>infra</u>.)

below.

B. THE COURT SHOULD HAVE GIVEN RES JUDICATA EFFECT, AND FULL FAITH AND CREDIT, TO THE NEW MEXICO JUDGMENT.

Appellants hasten to add that they do not contend that the court was correct in failing to give effect to these judgments. Quite the contrary, they not only should have been given effect; the law required that they receive full faith and credit. The Res Judicata Act and the pertinent authorities make it clear that federal courts must give full faith and credit to state-court judgments; it is a mandatory proposition, with nothing permissive or discretionary about it.

Res Judicata Act, 28 U.S.C. §738
(third paragraph). [6]

> "Full faith and credit means that a judgment in one state must be given the full effect it is given by the law and usage in the state of its origin. And, too, the judgments of a state must be given the same full faith and credit in federal courts."

Nelson v. Miller (9th Cir. 1952),
201 F.2d 277, 279 [1];

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[6] "[The] judicial proceedings [of any state, territory or possession] shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

Accord: Williams v. Murdoch (3rd Cir. 1964), 330 F. 2d 745, 751 [2] (and authorities collected).

Therefore, the failure to give effect to those two judgments was not merely a failure to base the decision below upon evidence; it was also a failure to follow the legal requirements as to what effect should be given to that particular type of evidence. At the very least, then, the party who recovered judgment against the other party should be entitled to satisfy that judgment in preference to the judgment debtor's claim, and without reference to the fact that the judgment debtor had some claim against non-parties. Furthermore, even if there were to be some sharing in the fund, at a minimum it would have to be in proportion to the entitlement established in the state courts.

But the necessary effect of those judgments does not even stop at that minimum. In fact, the true nature of the judgments is such as to completely oust the claim of the appellees and to entitle appellants to the entirety of the fund.

Appellants' New Mexico judgment is a plenary, in personam judgment, entitling appellants to recover dollars from appellees. It is not tied in with or restricted to any other litigation, procedure, or fund. Thus, it is the most familiar and also the most encompassing type of judgment recognized in the law.

On the other hand, appellees' California judgment was nothing of the sort. It appeared to be an in personam money judgment, but that was only the form of words employed; the substance

was quite different. The law, of course, looks to substance rather than form.

Young v. Higby Co. (1945), 324 U.S. 204, 209,
89 L.Ed. 890, 65 S.Ct. 594;

Electric Bond & Share Co. v. Securities and Exchange Commission (1938), 303 U.S. 419, 440,
82 L.Ed. 936, 58 S. Ct. 678;

First National Bank of Portland v. Dudley (9th Cir. 1956), 231 F.2d 396, 402.

In substance, the California judgment was merely some sort of an in rem order purporting to determine appellees' rights to recover from the fund on deposit in the registry of the District Court in this case -- and nothing more. In contrast to the New Mexico judgment, which conclusively adjudicated rights of recovery between the parties to this action, the California judgment did not conclusively adjudicate rights against anybody -- let alone against any party to this action. It was, purely and simply, an attempt by the state court to decide the issue pending in the United States District Court. That, it is submitted, the California court could not do.

True, the state courts are the proper forum for determining substantive rights and liabilities of litigants in tort actions, as the New Mexico court did but the California court did not. Once such an in personam adjudication is made, as it was in New Mexico, it becomes res judicata and will be accepted by the federal courts. But it is one thing to decide substantive, personal rights and

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

liabilities of tort litigants, and quite another thing to attempt to make an <u>in rem</u> adjudication of a controversy over which the federal courts have already taken jurisdiction. Therefore, the one judgment which was entitled to res judicata effect should have been given that effect and the other judgment, being entitled to no effect on the parties, should have received none.

C. THE FACT THAT APPELLEES FAILED TO CONTEST THE NEW MEXICO ACTION IS IMMATERIAL.

The District Court appears to have predicated its cavalier treatment of the New Mexico judgment on the ground that the New Mexico judgment was "a default" [R. T. 8/28/67, 28:8-9], and therefore the California judgment was somehow "better" and the New Mexico judgment subject to being brushed aside.

Virtually at the outset of the "hearing" of August 28, the court announced its predetermination of how the fund should be divided, in surprising terms:

> "Let me give you -- my idea is to pay out the specials first. Then, with the balance left, I think, it is only fair to divide it three ways. One to Katherine Kumm, another to the Gautreauxes to satisfy all of the Gautreauxes <u>because that was a default judgment over there</u> and their specials are relatively minor to

Katherine Kumm's specials. [7] But, they are important to be taken care of and so on." [R. T. 8/28/67, 9:3-9, emphasis added].

Thus, not only was the solemn judgment of a state court summarily rejected, but also -- and worse -- the widower and orphans were somehow to be penalized for the fact that appellees did not choose to answer the New Mexico lawsuit. It seems bad enough to treat a judgment of a court with jurisdiction as somehow a "second class" judgment just because the defendant didn't happen to want to appear in that court; it seems even worse (and more illogical) to penalize the state court plaintiff for the defendant's failure to appear and to reward the defaulting defendant. That would be intolerable in any case, as a matter of judicial and public policy. When it results in punishing bereaved survivors, it becomes doubly unthinkable and almost vicious in its import.

This dwelling upon the default nature of the New Mexico judgment was totally misplaced. Certainly it would be an exercise in questionable judicial policy (and morality, for that matter) to reward a litigant for boycotting proceedings and allowing default to be taken, to say nothing of punishing a plaintiff because the defendant chose to default.

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[7] Admittedly, it may sometimes be cheaper -- in terms of out of pocket "specials" -- to bury a wife and mother than to nurse some broken ribs back to health. To assume, however, that therefore the loss is the lesser is to take a myopic and medieval view of the law of damages.

Where a state court has subject matter jurisdiction, its default judgment is perfectly entitled to full faith and credit and to res judicata effect and may not thereafter be collaterally attacked -- any more than a judgment rendered after contested trial may be. The fact that a litigant, deliberately or through negligence, fails to litigate the case and suffers a default does not entitle that litigant to collaterally attack the default judgment in a later proceeding.

> Midessa Television Co. v. Motion Pictures For Television (5th Cir. 1961), 290 F.2d 203, 204-5 [4-6]; cert. denied 368 U.S. 827.

As the New Mexico court noted, it acquired jurisdiction under that state's non-resident motorist act. [8] That substituted service under such statutes results in jurisdiction which is just as "good" as any other form of jurisdiction has been settled for more than forty years.

> Hess v. Pawloski (1927), 274 U.S. 352, 356-7, 71 L.Ed. 1091, 47 S. Ct. 632;

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[8] §21-3-16, New Mexico Statutes Annotated, 1953 Compilation:

> "Any person, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts enumerated in this subsection thereby submits himself or his personal representative to the jurisdiction of the courts of this state as to any cause of action arising from: . . . (2) the operation of a motor vehicle upon the highways of this state; (3) the commission of a tortious act within this state . . . ."

Held constitutional in Clews v. Stiles (9th Cir. 1960), 303 F.2d 290, 292; Cf. §64-24-3 of the same code, relating to service of process on the Secretary of State, and 64-24-4 prescribing the procedure to be followed.

See 5 UCLA Law Review 198, 199-201 and authorities collected.

III

SINCE APPELLEES' POSITION CONSTITUTES A PROFITING FROM THEIR OWN WRONG, IT WOULD BE ERROR TO ALLOW THAT PROFIT EVEN UNDER PROPER, CONSTITUTIONAL PROCEDURES AND EVEN IF THERE WERE NOT A PREVIOUS, CONTRARY JUDICIAL DETERMINATION.

The discussion in the two preceding sections is believed to be determinative. With procedural unconstitutionality appearing and a denial of full faith and credit, there seems little basis for further dispute.

However, in the interests of orderly judicial administration (to say nothing of fundamental fairness), it is worthwhile to pay some attention to the basic nature of appellees' position.

Even apart from the prior adjudication aspect of the case, there would be little virtue in remanding the case for the purpose of following proper procedures, without at the same time giving appropriate directions to prevent a judgment which is substantively obnoxious to established principles of law and equity.

A. PRINCIPLES OF EQUITY CONTROL THE DETERMINATION OF ADVERSE CLAIMS IN INTERPLEADER.

A proceeding in interpleader is an equitable action and controlled by the principles of equity.

State Farm Fire & Casualty Co. v. Tashire, supra;
Texas v. Florida (1939), 306 U.S. 398, 405, 412
83 L.Ed. 817, 59 S. Ct. 563;
Schlemmer v. Provident Life & Acc. Ins. Co.
(9th Cir. 1965), 349 F.2d 682, 684-5 [3].

Among other equitable propositions which flow from that fact, the following are established:

1) A suitor in the equitable action for interpleader "must do equity and come into court with clean hands".

Great American Insurance Company v. Bank of
Bellevue (8th Cir. 1966), 366 F.2d 289, 293;

2) The court has inherent power to apply the Interpleader Act as a remedial statute, so as not to result in a hardship or injustice.

Austin v. Texas-Ohio Gas Company (5th Cir. 1955),
218 F.2d 739, 745-6 (and see authorities
collected); and, finally,

3) A tortfeasor may not employ the equitable protections of interpleader "against the consequences of [the tortfeasor's] own wrong".

Holcomb v. Aetna Life Insurance Company
(10th Cir. 1955), 228 F.2d 75, 82,
cert. denied 350 U.S. 986.

B. THOSE EQUITABLE PRINCIPLES ARE VIOLATED BY THE JUDGMENT BELOW.

Of the three equitable principles of interpleader just canvassed, there is one which is: 1) the most pertinent to the case at bar; 2) the most frequently and forcefully enunciated by the courts; and 3) a sort of synthesis of the entire nature of equity.

That is the particularization of the "clean hands doctrine" in the form of "the rule that 'a tort-feasor cannot obtain protection in an action in the nature of interpleader against the consequences of his own wrong.' "

Pan American Fire & Casualty Company v. Revere
(D.C. E.D. La. 1960), 188 F. Supp. 474,
481-2 [8].

In fact, the very district court from which this appeal is taken has, in other cases, examined the proposition that the law should allow no man to profit by his own wrong, terming it an old, established, familiar maxim of jurisprudence applicable, among other things, in interpleader actions involving claims to insurance proceeds. For example:

Manufacturers Life Ins. Co. v. Moore
(D.C. S.D. Calif. 1953), 116 F. Supp. 171, 174;

Prudential Ins. Co. of America v. Harrison
(D.C. S.D. Calif. 1952), 106 F. Supp. 419, 424.

In the case at bar, the appellees are not only seeking recovery notwithstanding the fact that they lack clean hands; the very gravamen of their claim is an assertion of their own tortious liability, and an attempt to recover because of that liability. That, it is submitted, no court of equity will suffer.

In effect, appellees came before the court asserting, in the first instance, a claim against their own driver. In that, however, they would be balked by the guest legislation applicable in both pertinent jurisdictions (please see infra, §2). Therefore, they were required to establish a business relationship, a form of partnership between themselves and the deceased driver, in order to make a prima facie case against her estate. Having accomplished this, however, they have decided that they don't care to bear the burdens of that partnership, but only its benefits, and to assert claims paramount to those victimized by the partnership (the appellants), notwithstanding the partnership's fault.

In other short words, they had to establish their own participation in the fault in order to be in court in the first place, but nevertheless sought to recover against those who suffered from that fault.

1. APPELLEES ARE NO BETTER OFF, WHICHEVER JURISDICTION'S LAW IS CHOSEN.

Before examining the effect of that incredible proposition -- regrettably adopted by the District Court, implicitly, in its judgment -- it is necessary to examine briefly the question of choice of law and the effect of the choice which is made.

The District Court gave no indication of what jurisdiction's law was being applied. It was, of course, necessary that the law of some state apply since, under Erie R. Co. v. Tompkins (304 U.S. 604), no amorphous federal common law applies; the Erie rule applies in insurance-benefit interpleader actions.

> Ettlinger v. Connecticut General Life Ins. Co.
> (9th Cir. 1949), 175 F.2d 870, 872 [1].

It seems probable that there are only two states whose law is likely to be chosen: New Mexico (the place of the tort) or California (the place of appellees' domicile and the place where the insurance carrier chose to commence the interpleader action).

Traditionally, the place of the tort governs.

> Slater v. Mexican Nat. R.R. Co. (1904),
> 194 U.S. 120, 126, 48 L.Ed. 900,
> 24 S. Ct. 581.

Thus, if the historically-tested rules for choice of law are applied, the District Court would be required to apply New Mexico law. Admittedly, however, there is a trend away from simple application of the place-of-the-tort rule in favor of more modernistic rules of

"grouping of contacts" or "center of gravity".

Eg., Reich v. Purcell, 67 A.C. 560, 562, 63 Cal. Rptr. 31, 432 P.2d 727;

Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 95 A.L.R.2d 1 (annotated at 95 A.L.R.2d 12, et seq.).

Fascinating though that academic debate may be, it is really unnecessary to decide whether this Court should assume that the Supreme Court's ruling in Slater is still "good law", or will predict that the Court will eventually adopt the more "modern" tests. Whichever is adopted, there is much to be said for applying New Mexico law. Apart from being the place of the tort, New Mexico is also the state in which all parties were present and in which the rights of both sides of this appeal were adjudicated in the state courts. California, on the other hand, has only the happenstance contact of appellees' domicile, plus the fact that appellees litigated against third parties in this state -- and did so only as an appendix to the interpleader action. Thus, even under a grouping of contacts test, it would appear that New Mexico law might well apply.

Once again (as will appear shortly) even that doesn't make much difference, since the appellees appear clearly to be barred from unjustly enriching themselves by means of their own tortious conduct under the laws of either state.

2. UNDER THE LAW OF EITHER STATE, APPELLEES HAD TO ESTABLISH THEIR OWN PARTICIPATION IN THE NEGLIGENCE IN ORDER TO MAKE A PRIMA FACIE CASE.

Whichever law is applied, the wrongful participation of appellees is unassailably established.

Appellee Kumm was a passenger in the death car (driven by Ann Margaret Baumbach), whereas she and Appellee Sweeney both claim in the shoes of another rider, the deceased Elva Baumbach. Therefore, at the outset, neither could claim as against the fund -- which, it must be remembered, insured against the liability of their driver, Ann Margaret Baumbach -- under the guest statutes of either state. Neither California nor New Mexico allows recovery for personal injury to or wrongful death of a guest in a motor vehicle sustained as a result of the negligence of the host-driver.

California Vehicle Code §17158; 9/

9/ "No person riding in or occupying a vehicle owned by him and driven by another person with his permission and no person who as a guest accepts a ride in any vehicle upon a highway without giving compensation for such ride, nor any other person, has any right of action for civil damages against the driver of the vehicle or against any other person legally liable for the conduct of the driven on account of personal injury to or the death of the owner or guest during the ride, unless the plaintiff in any such action establishes that the injury or death proximately resulted from the intoxication or willful misconduct of the driver."

New Mexico Statutes Annotated §64-24-1 and 2; [10]

See Patton v. LaBree, 60 Cal. 2d 606,

35 Cal. Rptr. 622, 387 P. 2d 398;

Gallegos v. Wallace, 74 N. M. 760,

398 P. 2d 982, 984.

Therefore, since the only conceivable recovery which appellees could obtain was against the fund of their own driver's insurance, it was necessary for them to somehow wiggle out from under that statutory ban. They did so by asserting that they were engaged in a joint adventure with their deceased driver and succeeded in persuading the California court of that joint venture so as to take them out of guest status and allow them recovery -- since a member of a joint venture may recover against a negligent driver who is a member of that venture.

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[10] §64-24-1, New Mexico Statutes Annotated, 1953 Compilation:

> "No person transported by the owner or operator of a motor vehicle as his guest without payment for such transportation shall have a cause of action for damages against such owner or operator for injury, death or loss, in case of accident, unless such accident shall have been intentional on the part of said owner or operator or caused by his heedlessness or his reckless disregard of the rights of others."

a. BY ESTABLISHING A JOINT VENTURE WITH THE NEGLIGENT PARTY, APPELLEES ESTABLISHED IMPUTATION OF THAT NEGLIGENCE TO THEMSELVES.

However, that "solution" to one of their problems merely left them impaled upon the other horn of a dilemma, since a joint venturer's negligence is imputed to other members of the joint venture whenever the rights of third parties are at issue. This, of course, was the basis upon which the New Mexico court was able to render judgment against the appellee Kumm; the deceased driver's negligence was thus imputed to her -- as established by a final, conclusive judgment (please see discussion, supra).

Furthermore, by establishing that joint venture, appellees established themselves out of court, since the negligence of their joint venturer-driver became their negligence insofar as third persons are concerned. Under New Mexico law:

> "If two or more persons unite in joint prosecution of a common purpose, under such circumstances that each has the authority to control the means to execute such purpose, the negligence of one is chargeable to the other; and this applies if they use an automobile as a conveyance for their joint purpose."
>
> Silva v. Waldie, 42 N. M. 514,
>
> 82 P. 2d 282, 286;

Quoted and followed: Knudson v. Boren

(10th Cir. 1958), 261 F.2d 15, 19 [7].

Under California law, the same result obtains. The California Supreme Court has held to be well established the general rules that:

> " 'The relationship of joint venturers is that of a mutual agency, akin to a limited partnership' [citation], and that the negligence of one joint venturer . . . acting in connection with the joint venture is imputed to the other joint venturers. [Four citations]."

Leming v. Oilfields Trucking Co.,

44 Cal. 2d 343, 350 [3 and 4],

282 P.2d 23, 27;

Cf., Buck v. Standard Oil Co.,

157 Cal. App. 2d 230, 239, 321 P.2d 67, 73.

Thus, both appellees were wrongdoers in their self-asserted capacity as joint venturers.

b. THE POSITION OF APPELLEE KUMM IS DOUBLY TAINTED, SINCE THE DRIVER'S NEGLIGENCE IS ALSO IMPUTED TO APPELLEE AS OWNER-PRINCIPAL.

The claim of appellee Katherine Kumm -- to whom the District Court awarded a sum of money greater than the aggregate awarded to the entire Gautreaux family -- is doubly untenable. She

was not only charged with the wrongdoing as a joint venturer-partner; on top of that, her position was equally tainted by her status as an owner-passenger.

The Tenth Circuit has held this to be true under New Mexico law.

> "The authorities are in general accord that a person riding as an occupant in his own auto, which is being used for a purpose in common with the driver, is presumed to have the right to control the vehicle and direct the movements of the vehicle, and the negligence of the driver is imputed to the owner. 38 AmJur., Negligence, §249. The acceptance of this rule was indicated by the Supreme Court of New Mexico . . . ."
>
> Knudson v. Boren, supra, 261 F.2d at 19; citing Silva v. Waldie, supra, 82 P. 2d at 286.

California's position is at least as clear concerning imputation of liability to an owner-occupant for whose benefit the trip is being conducted. The California statute (as it read at the time of the occurrence and the trial) [11] provides:

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[11] The statute was amended at the 1967 session of the California Legislature in several particulars, some immaterial to this case and some putatively significant. It was provided, however, that: "This act does not confer or impair any right or defense arising out of any death or injury to person or property occurring prior to the effective date of this act."

California Statutes, 1967, Chapter 702, §14.

The effective date of the California statutes adopted at the (Continued)

> "Every owner of a motor vehicle is liable and responsible for the death of or injury to person or property resulting from negligence in the operation of the motor vehicle, in the business of the owner or otherwise, by any person using or operating the same with the permission, express or implied, of the owner, and the negligence of such person shall be imputed to the owner for all purposes of civil damages."
>
> California Vehicle Code §17150.

When the passenger provides the car and the driver is operating it for the passenger's benefit, the relationship of principal and agent exists between driver and owner as a matter of law, and therefore the driver's negligence is imputed inexorably.

Souza v. Corti, 22 Cal. 2d 454, 461,
139 P. 2d 645, 648;
Glanville v. Cannick, 182 Cal. App. 2d 514, 517,
6 Cal. Rptr. 175, 177.

C. THUS, NEITHER APPELLEE HAD STANDING TO ASSERT A CLAIM IN A COURT OF EQUITY ARISING OUT OF HER OWN LIABILITY.

The case, therefore, presents an almost unbelievable

11/ (Continued) 1967 session of the California Legislature was November 8, 1967. The injury and death involved in the case at bar occurred in 1964.

picture. Two suitors in equity come before the court in the posture of having been required to establish their own liability for the accident on which the case is based and nevertheless claiming the right to prevail over the appellants whose only "fault" was that of being in the path of the negligently-operated juggernaut of the decedent, whose negligence the appellees have actually embraced.

It is bad enough to see a court of equity giving serious consideration to such a claim. It is even more incredible to find that appellees Kumm and Sweeney have been preferred by the District Court over appellants -- appellants who are not even charged with any wrongdoing, and who have been judicially determined to be free of wrongdoing.

It is bad enough, it is submitted, for Appellee Sweeney, personal representative of the self-proclaimed joint venturer of the tortfeasor who widowed and orphaned the appellants, to walk away from the court with some $1700 in insurance proceeds which belong to the appellants and which she claimed on the cynical basis that she was entitled to be reimbursed by her own insurance for her own negligence. It is infinitely worse and infinitely more incredible to observe the Appellee Kumm leaving the court with $9200 -- more than the whole Gautreaux family put together -- when Kumm is triply tainted: 1) as the joint venturer of the wrongdoer; 2) as the owner in control of the death-dealing vehicle; and 3) as the judicially determined tortfeasor under a final judgment.

In contrast, the three appellants, who were nothing but victims, were awarded the grand total of some $8200 for the loss

of their wife and mother, burial expenses and the personal injuries which each of them sustained. Even if the court had been applying law and evidence, rather than "fair settlement", it would seem that such a concept of fairness would be difficult to justify. Under the law and the principles of equity concerning the setting up of one's own wrong, it seems even more unjustifiable.

Lest there be any mistake, it should be pointed out that the law does not only frown on litigants' capitalizing on their own direct liability. Even a litigant to whom liability is imputed is barred from such an unconscionable position; when even a vicariously-liable litigant comes into court, "his hands ought not to have the blood of the dead or injured . . . upon them, when he thus invokes the impartial powers and processes of the law." Or, phrased somewhat less colorfully, "It is contrary to the policy of the law for [a litigant] to profit by the wrong [of the one in whose shoes he stands]."

Witt v. Jackson, 57 Cal. 2d 57, 71-72 [16],
17 Cal. Rptr. 369, 377 [17],
366 P. 2d 641, 649 [17];
Lovette v. Lloyd, 236 N. C. 663,
73 S. E. 2d 886, 891-2;
Brown v. Southern Ry. Co., 204 N. C. 668,
169 S. E. 419, 420.

A converse rule, it is recognized, results in unjust enrichment of the one to whom the wrongdoing is imputed, at the expense of the third party, a form of unjust enrichment which the law (and

certainly equity) will not countenance. For example, in addition to the cases just cited:

Kesler v. Pabst, 43 Cal. 2d 254, 256-7,
273 P. 2d 257, 258-259.

If there ever was a judgment which exuded the very essence of unjust enrichment, it is this one.

CONCLUSION

For the reasons stated, the judgment below must be reversed. Upon the remand, the District Court should be ordered to take evidence concerning the conflicting claims of the parties and to apply the applicable principles of law thereto; provided, however, that the District Court should be instructed to prohibit any attempt to relitigate or collaterally attack the final judgment of the New Mexico court, to which full faith and credit must be given. Furthermore, the District Court should be directed to take only such proceedings and grant only such relief as might not have the effect of allowing appellees to assert a claim based upon their own wrong, whether that wrong be direct or imputed to them under their own theories of the case.

Respectfully submitted,
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CERTIFICATE

I certify that in connection with the preparation of this brief I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Edward L. Lascher

EDWARD L. LASCHER